

Professional Conduct requires a lawyer to maintain complete records of all funds or other property of a client received by the lawyer and to render to the client appropriate accountings of the receipt and disbursement of any of the client's funds or property held by the lawyer. Rule 10.2(e) [now 1.15-2(e)] recognizes a lawyer's obligation to pay promptly or deliver to the client, or to a third person as directed by the client, the funds in the possession of the lawyer to which the client is entitled. Strictly interpreted, these rules would appear to require a lawyer not to disburse upon items deposited in his or her trust account until the depository bank has irrevocably credited the items to the account.

Requiring a closing lawyer to postpone disbursement until all items have been credited to the lawyer's trust account would result in inconvenience, delay, and could have an adverse effect on the economy. Nevertheless, there is some risk that certain instruments, such as ordinary commercial checks, may be uncollectible in any given transaction. Conversely, there are financial instruments that are generally regarded as extremely reliable. In fact, other state bars that have considered the issue have held that there are certain financial instruments for which the risk of noncollectibility is so slight as to make it unnecessary to prohibit a closing lawyer from disbursing immediately against such items before they are collected. See Virginia State Bar Legal Ethics Opinion 183 and Rule 5-1.1(g) of the Rules Regulating the Florida Bar. Similarly, the North Carolina Good Funds Settlement Act permits a "settlement agent," or person responsible for conducting the settlement and disbursement of the proceeds for a residential real estate closing, to disburse against uncollected funds but only if the deposited instrument is in one of the forms specified in the Act.

Notwithstanding the fact that some of the forms of funds designated in the Act are not irrevocably credited to the lawyer's trust account at the time of deposit, the risk of noncollectibility is so slight that a lawyer's disbursement of funds from a trust account in reliance upon the deposit into the account of provisionally credited funds in these forms shall not be considered unethical. However, a closing lawyer should never disburse against any provisionally credited funds unless he or she reasonably believes that the underlying deposited instrument is virtually certain to be honored when presented for collection. A lawyer may immediately disburse against collected funds, such as cash or wired funds, and may immediately make disbursements from his or her trust account in reliance upon provisional credit extended by the depository institution for funds deposited into the trust account in one or more of the forms set forth in G.S. §45A-4.

The disbursement of funds from a trust account by a lawyer in reliance upon provisional credit extended upon the deposit of an item into the trust account which does not take one of the forms prescribed in the Act constitutes professional misconduct, regardless of whether the item is ultimately honored or dishonored. However, a lawyer who disburses in reliance upon provisional credit extended upon the deposit of an item prescribed in the Act shall not be guilty of professional misconduct if that lawyer, upon learning that the item has been dishonored, immediately acts to protect the property of the lawyer's other clients by personally paying the amount of any failed deposit or securing or arranging payment from sources available to the lawyer other than trust account funds of other clients. An attorney should take care not to disburse against uncollected funds in situations where the attorney's assets or credit would be insufficient to fund the trust account checks in the event that a provisionally credited item is dishonored.

To the extent that CPR 358 and RPC 86 are inconsistent with this opinion, they are overruled. However, there are provisions in both opinions that remain operative. Specifically, the provision of CPR 358 that prohibits a lawyer from disbursing against the "float" in the trust account during the time lag between the deposit of the checks of the lender, the buyer, and the real estate agent and the time when these items are irrevocably credited to the account unless provisional credit for the items is extended by the depository institution remains in effect. If provisional credit is not extended by the depository institution, the disbursing lawyer is using the funds of other clients to cover the closing disbursements until the deposited items are collected in violation of Rule 10.1 [now 1.15-1].

It should be emphasized that this opinion shall apply to any disbursements from the trust account against items which are not irrevocably credited to the account upon deposit, whether such disbursements are for the purpose of closing a real estate transaction or for the purpose of concluding some other transaction or matter.